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Supreme Court of the United States

October Term, 1952

No. 511

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY and THE NEW YORK AND LONG BRANCH RAILROAD COMPANY, each a Corporation organized under the laws of the State of New Jersey,

Appellants,

vs.

THE DEPARTMENT OF PUBLIC UTILITIES, Board of Public Utility Commissioners, State of New Jersey,

Appellee.

BRIEF OPPOSING APPELLEE'S MOTION TO DISMISS OR AFFIRM

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On November 7, 1952, the Attorney General of the State of New Jersey, acting upon behalf of The Department of Public Utilities, Board of Public Utility Commissioners, State of New Jersey, hereinafter referred to as the "Appellee", served upon Appellants a motion to dismiss the Appeal allowed in this cause or, in the alternative, to affirm the final decree and judgment of the Supreme Court

of New Jersey. That decree and judgment upheld the Appellee's order requiring Appellants to reduce their already confiscatory intrastate commuted fares to a scale substantially below the current level.

As demonstrated in Appellants' Assignment of Errors and their Statement As To Jurisdiction, the basic and substantial questions raised upon this Appeal concern the denial of substantive and procedural due process (Appellants' Statement As To Jurisdiction, pp. 9-11). That the Supreme Court of New Jersey recognized the essential issue is confiscation is clear from the Opinion of that Court (Appellants' Statement As To Jurisdiction, Appendix D; *Central R. Co.* v. *Bd. of Public Utility Commissioners*, 10 N. J. 255, 262-266).

Appellee, however, urges that this Appeal be dismissed because this Court lacks jurisdiction to consider these grave constitutional questions. This asserted jurisdictional defect exists, Appellee contends, because at no point during the proceedings did Appellants question the constitutionality of the New Jersey law which conferred upon the Appellee the statutory authority to establish just and reasonable rates. Thus, Appellee argues that the requirement of 28 U. S. C. §1257 (2) that there be drawn in question the validity of a state statute on the ground of its being repugnant to the Constitution of the United States has not been met.

But the New Jersey Law (New Jersey Revised Statutes 48:2-21 (d) N. J. S. A.) is not the "state statute" Appellants contest. The "state statute" which Appellants have consistently attacked as violative of the United States Constitution is the order of the Appellee, made in its legislative capacity (*Public Service Coordinated Transport* v.

State, 5 N. J. 196, 224), confiscating Appellants' property by requiring a further reduction in their presently non-compensatory intrastate commuted fares.

Apparently, Appellee's position is attributable to a misconprehension of the meaning and scope of the term "state statute" as used in 28 U. S. C. §1257 (2). This Court has long and consistently held that "state statute" jurisdictionally does not have the narrow meaning which Appellee would give to it.

The first occasion it had judicially to consider the meaning of the phrase "state statute" as now used in 28 U. S. C. §1257 this Court held, without dissent, that, "Any enactment, from whatever source originating, to which a State gives the force of law is a statute of the State, within the meaning of the clause cited relating to the jurisdiction of this Court. It would be a narrow construction to limit the term to such enactments as have gone through various stages of consideration by the legislature". *Williams* v. *Bruffy*, 96 U. S. 176, 183.

That the definition there announced by this Court includes orders of a state public utility commission entered in the regulation of a railroad is illustrated by *Lake Erie & W. R. R. Co.* v. *Pub. Utility Comm.*, 249 U. S. 422. There the state commission ordered a railroad to restore a side track which had been removed. Concerning the jurisdictional question the Court said (249 U. S. at 424):

> "It is contended here, as it was in the state courts, that the order contravenes the due process of law clause of the Fourteenth Amendment, in that it takes property of the railroad company for private use, or for public use without compensation.
>
> "Such an order, being legislative in its nature and made by an instrumentality of the State, is a state law within the meaning of the Constitution of the United

States and the laws of Congress regulating our jurisdiction. *Grand Trunk Western Ry. Co.* v. *Railroad Commission of Indiana*, 221 U. S. 400, 403; *Ross* v. *Oregon*, 227 U. S. 150, 162-163; *Home Telephone & Telegraph Co.* v. *Los Angeles*, 227 U. S. 278, 295, 296; *Atlantic Coast Line R. R. Co.* v. *Goldsboro*, 232 U. S. 548, 555; *Wadley Southern Ry. Co.* v. *Georgia*, 235 U. S. 651, 660-661; *Arkadelphia Milling Co.* v. *St. Louis Southwestern Ry. Co.*, 249 U. S. 134."

See also:

Market Street R. Co. v. *Comm'n*, 324 U. S. 548, 552-554;

King Mfg. Co. v. *Augusta*, 277 U. S. 100, 104;

Live Oak Water Users' Association v. *Railroad Commission of California*, 269 U. S. 354, 356.

It is, therefore, clear that Appellee's motion to dismiss rests upon an untenable theory, is without merit and should not be granted.

The motion to affirm is based upon an equally spurious argument. It assumes that a state regulatory agency, by resorting to the cavalier device of requiring the production of exhaustive evidence which is both worthless and costly, may confiscate an utility's property, without regard to the constitutional guarantees of substantive and procedural due process contained in the 14th Amendment.

Appellants in their Statement As To Jurisdiction have shown that the questions are substantial and that the decision of the Supreme Court of New Jersey is contrary to principles long established by this Court.

Conclusion

For the reasons discussed herein, as well as for those presented in the Statement As To Jurisdiction, Appellants urge that Appellee's motion to dismiss or affirm be denied.

Respectfully submitted,

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